BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit sought to be reviewed was handed down on November 12, 1941.

It is reported in 123 Fed. (2d) 782, Advance Sheet No. 6. No petition for rehearing was filed.

II.

JURISDICTION

1. The ground on which the jurisdiction of this Court is invoked is Judicial Code 240, as amended by Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 938) (28 U. S. C. A. 347), providing for the issuance of writs of certiorari by the Supreme Court of the United States to review judgments of the Circuit Court of Appeals.

2. The facts in this case as stipulated show that the nature of the case and of the rulings below were such as to bring the case within the scope of the provision relied on.

3. This case is of great public importance to the citizens of Oklahoma in that it effects the refund of many thousands of dollars in taxes paid on tax exempt allotted Indian lands located in the former Indian Territory of Oklahoma, which claims for refund have been assigned to third persons for value by said allottees.

III.

STATEMENT OF THE CASE

The nature of the case and the ruling of the Circuit Court of Appeals for the Tenth Circuit has already been stated in the foregoing petition which is adopted as a part of this brief.

IV.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals below erred:

(a) In holding that the United States could maintain an action in United States District Court and the Circuit Court of Appeals in its own behalf and upon behalf of two unrestricted Choctaw Indian allottees to recover ad valorem taxes wrongfully assessed and collected by a State sovereignty upon unrestricted allotted lands of said allottees when said allottees had prior thereto, for a valuable consideration, sold, conveyed and assigned all their right, title and interest in and to their claim to said refund of said taxes.

(b) In holding that Minnie Brewer, one-fourth degree Choctaw, and Lake Brewer, Choctaw citizen by marriage, admittedly unrestricted Indians are still wards of the Federal Government.

(c) In holding that an adverse adjudication by a State court of competent jurisdiction over the same subject matter, to which the same unrestricted Indians were

privy, as assignors of the claim for refund, does not constitute *res adjudicata* as to the United States, when it was not a party to the proceedings.

V.

ARGUMENT

Summary of the Argument

(a) The stipulated fact that the Brewers, unrestricted Indians and citizens of the United States, with full and complete power to contract, for a valuable consideration, bargained, sold and assigned all their right, title and interest in and to their claims to the items of taxes involved herein to one Broadwell, *is conclusive that said Indians could have no interest whatsoever in any moneys recovered by the United States in this action*, and therefore, said Indians having no interest, the United States certainly has no authority to institute and maintain, in our Federal Courts, this action, for itself or for and on behalf of Minnie and Lake Brewer.

While the United States may have owed a duty to such unrestricted Indians under treaty agreements between the Indians and the United States Government to see that their allotted lands were not taxed for twenty-one years from date of patent, these unrestricted Indians had all the power and authority necessary to contract with reference to their lands or any other personal property right which they possessed, and having sold and assigned all their interest in their claims for refund of the taxes involved herein for a valuable consideration, said unrestricted Indians were thereby made whole and there was nothing left for the United

States Government to do to protect such Indians as they had not been hurt. To permit the United States to prevail in this action, would be in effect holding that such Indian allottees were restricted Indians which would be contrary to the provisions of the Act of May 27, 1908, and the decisions of this Court.

(b) The Court will observe from the record that Minnie Brewer, one-fourth degree Choctaw Indian, and Lake Brewer, a Choctaw citizen by marriage (but of no Indian blood), in whose behalf the United States is attempting to maintain this action, are, and have been at all times herein, unrestricted Indians, and what restrictions, if any, on the alienation of their allotted lands were completely removed by the Act of May 27, 1908, 35 Stat. at Large, Chapter 199, p. 312. These facts are stipulated herein (R. 34-54). Furthermore, the moneys used by the Brewers to pay said taxes were unrestricted, and the United States never at any time had supervision or control over said money or any part thereof.

It is the policy of Congress at all times touching Indian affairs to place the Indian, as far as practicable and beneficial to the Indian, on the same footing as other citizens of the community or state in which the Indian resides, and the course of its legislation discloses the plan of the Government to gradually emancipate the Indian from his former status as a ward, to prepare him for complete independence by education and the gradual release of his property to his own individual management, imposing upon him both the responsibilities and privileges of the owner

of property, including the duty to pay taxes, leaving the regulatory State and Federal laws to operate on him as in the case of other persons and property. This Court should so construe the Act of May 27, 1908. The Brewers not being wards of the Federal Government, but being citizens of the State of Oklahoma and amenable to the laws thereof and being the real parties in interest, in whose behalf the Government attempts to maintain this action, there is no diversity of citizenship and therefore the District Court of the United States and the Circuit Court of Appeals have no jurisdiction of this case.

(c) Where a state court of competent jurisdiction in Oklahoma has rendered a final judgment on a valid assignment for value of an unrestricted property right of an unrestricted Indian of the Five Civilized Tribes, such a judgment constitutes *res adjudicata* as to the assignee and the Indian in privy with him, and is conclusive as to the United States in a latter suit covering the same subject matter, even though the United States was not a party to the first suit.

Argument in Chief

(Proposition a.)

It is elementary that the Brewers, being unrestricted Indians and the owners of unrestricted allotted lands, possessed the right to contract with respect to such property or any other personal property right which they possessed, and having exercised that right by executing an assignment, for value, of their claims for refund of the identical items of taxes involved herein, to Broadwell, they would have no interest whatsoever in any moneys recovered by the United States in this action, and therefore the United States has no right to invoke the jurisdiction of the United States District Court, or of the Circuit Court of Appeals, in its own behalf or on the behalf of the Brewers in this action. The Circuit Court of Appeals of the Tenth Circuit and this Honorable Court have held that a *restricted* Indian possesses the right to contract with respect to his unrestricted property, or to convey it. See *United States* v. *Lee*, 108 Fed. (2d) 936 (C. C. A. 10); *State* v. *Waller*, 243 U. S. 452; *United States* v. *Beebe*, 127 U. S. 338, 32 Law Ed. 121. This being true, it follows that *unrestricted* Indians of the Five Civilized Tribes possess the right to contract with respect to their unrestricted property, or other property rights, such as the Brewers exercised in this case. The Supreme Court of the State of Oklahoma and the Supreme Court of the United States recognized this right in the following cases: *Broadwell* v. *Board of County*

Commissioners of Bryan County, 88 Okla. 147, 211 Pac. 1040, certiorari denied, 262 U. S. 749, 67 Law Ed. 1214; *Broadwell* v. *Board of County Commissioners of Carter County*, 71 Okla. 287, 175 Pac. 828; *Board of County Com'rs* v. *Broadwell, et al.*, 75 Okla. 9, 180 Pac. 955; *Ward* v. *Board of County Commissioners of Love County*, 253 U. S. 15, 64 Law Ed. 751; *Broadwell* v. *Board of County Commissioners of Carter County*, 253 U. S. 23, 64 Law Ed. 759.

The Tenth Circuit Court of Appeals and this Honorable Court have announced the rule that the United States Government has a right to enforce through the courts of the United States suits on behalf of Indian wards to enforce treaty agreements with the members of the Five Civilized Tribes which vested in the Indians a property right with respect to tax exemption on their allotted land for twenty-one years from date of patent. See *Board of County Commissioners of Tulsa County* v. *United States*, 94 Fed. (2d) 450; *United States* v. *Rickert*, 188 U. S. 432; *Stephens* v. *Cherokee Nation*, 174 U. S. 455; *Bowling and Miami Investment Company* v. *United States*, 233 U. S. 528; *Board of County Commissioners of the County of Jackson, Kansas* v. *United States*, 308 U. S. 343; *Heckman* v. *United States*, 224 U. S. 413; *United States* v. *Minnesota*, 270 U. S. 181.

In all of the above cases, with the exception of the case of *Board of County Commissioners of Tulsa County*

v. *United States, supra*, the property rights involved were those of restricted Indians of Oklahoma, or involved restricted Indian Tribes in other states. In *Board of County Commissioners of Tulsa County* v. *United States, supra*, the United States brought suit on behalf of a Cherokee Indian of one-eighth degree Indian blood to recover ad-valorem taxes and special improvement assessments which had been levied on said Indian's homestead, and which were paid under protest by the Indian to prevent the sale of said allotment by Tulsa County for said taxes.

The real question involved and relied upon by the Board of County Commissioners of Tulsa County was the application of the Act of April 12, 1926 (44 Stat. 239), which made the statute of limitations of the State of Oklahoma applicable to "all restricted Indians" of the Five Civilized Tribes. The Court held said Act of Congress applied only to suits involving title to allotted lands of "restricted Indians' and not to personal actions in assumpsit to recover back taxes illegally assessed on allotted lands. The only other question presented in said case was the right to recover interest on the taxes paid.

The above case can be distinguished from the case at bar in this, that here the Brewers, unrestricted Indian allottees, possessing all of the powers and privileges of contracting, as that of any other citizen of the State of Oklahoma, had for a valuable consideration, bargained, sold and assigned all their right, title and interest in and to their vested right to their claims for refund of the items of taxes

paid on their unrestricted allotted lands, while in the Tulsa County case the unrestricted Indian allottee had not sold and assigned her claim for the refund of the taxes which the United States sought to recover on her behalf. It is our contention that the Tenth Circuit Court of Appeals in the Tulsa County case did not have called to its attention the citations and authorities and Acts of Congress which we are presenting herein and which disclose that there are no restrictions on allottees, as intermarried whites and mixed blood Indians of less than half blood, including minors, and that such unrestricted Indians, in which class the Brewers fall, are amenable to the laws of the State of Oklahoma the same as any other citizen and possess the right to contract and to maintain actions in their own name affecting their property or property rights.

We therefore submit that if the United States is permitted to prevail in this action, the moneys recovered would legally belong to Broadwell, since he holds valid assignments for the claims for refund of said taxes. Certainly the Government would not contend that it had authority to institute and maintain this action in the Federal courts for the benefit of Broadwell, a white citizen of Oklahoma. For this Court to hold that the Brewers were entitled to the moneys recovered herein, rather than Broadwell, would result in the Brewers being paid twice for the taxes exacted of them by Bryan County.

(Proposition b.)

To what extent and in what manner is the Federal Government the guardian of Indians? How far does that guardianship extend and what does it embrace?

Well, let us first consider the fact that all Indians in Oklahoma are now and have been ever since statehood not only citizens of the United States but citizens of the State. Let us further consider that the Federal Government is under no greater duty to these Indians than to any other class or race of people except in relation to the allotted lands, inherited allotted lands, and restricted moneys and tribal properties— and except insofar as it controls the Indians' use and control of such properties. Beyond exercising control over such properties such as could be exercised by a guardian, the Federal Government has never sought otherwise to act or assume the role of guardian in respect to these Indians.

Therefore, so far as the moneys earned and properties acquired by an unrestricted competent Indian citizen, separate and apart, and independent of any tribal allotments or properties, or income therefrom, the Federal Government has never assumed to exercise the rights of guardianship over these Indians. So, therefore, as to the moneys that were paid by the unrestricted Indian woman and her non-Indian husband involved in this case, the Government has never had any exercise or control over that money, nor over this Indian woman and her non-Indian husband in

relation thereto, and the fact is that the Federal Government in this case is carrying the theory and the assumed principle of guardianship clear beyond all bounds of reason.

The Court's particular attention is directed to the fact that never at any time under the Act of June 28, 1898, as modified by the Act of July 1, 1902, were there any restrictions placed upon that class of Indians to which Minnie Brewer and Lake Brewer belong, and when the restrictions on the alienability of their lands were removed by the Act of May 27, 1908, all relation of guardianship and ward by the Government over such Indians, assuming such relationship existed, thereby became extinguished.

As further evidence of the fact that Congress recognized that all restrictions had been removed on allottees of the Five Civilized Tribes, enrolled as intermarried whites, as freedmen, and as mixed blood Indians of less than half Indian blood, including minors, it is observed that Congress, on April 12, 1926, passed an Act (44 Stat. at Large 239) which is entitled, "An Act to amend Sec. 9 of the Act of May 27, 1908 (35 Stat. at Large, 312), for putting in force, in reference to suits involving Indian titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes."

This Act makes the statute of limitations of Oklahoma specifically applicable to "restricted Indians" of the

Five Civilized Tribes and their heirs, but not to Indians of less than half blood, including minors and intermarried whites, the same being the class to which the Brewers belong, under the Act of May 27, 1908, *supra*. The language used in this Act evidences to our mind that Congress believed that its guardianship over unrestricted Indians, enrolled as intermarried whites, freedmen, and as mixed bloods having less than half Indian blood, including minors, had ceased, and that the statute of limitations and other laws of Oklahoma were applicable to such Indians.

In the case of *Blundell* v. *Wallace*, 96 Okla. 26, the Supreme Court in the body of the opinion said:

> "The effect of the Enabling Act and the schedule to the Oklahoma Constitution, as touching wills and testaments, was merely to substitute the Oklahoma territorial statutes for the laws then in force in the Indian Territory. *The policy of Congress at all times touching Indian affairs was to place the Indian as far as practicable and beneficial to the Indian, on the same footing as other citizens of the community or state in which the Indian resides, and this construction will be given to the acts of Congress unless the contrary intention appears.*'"

The above case was appealed to the Supreme Court of the United States, and is reported as *Blundell* v. *Wallace*, 267 U. S. 372, 69 Law Ed. 664. In the opinion of the Court delivered by Mr. Justice Sutherland, it is said:

> "By Sections 12 and 16 of the Supplemental Agreement with the Choctaws and Chickasaws, ratified by the Act of July 1, 1902, supra, lands of the kind here involved were declared to be inalienable during specified periods of time. It is settled that this restriction against alienation extended to a disposition by will

(Taylor v. Parker, 235 U. S. 42, 59 L. Ed. 121, 35 Sup. Ct. Rep. 22); and, but for Sec. 23, it is plain that the devise in question, at least, as to the homestead, would have been without effect.

"But, it must be borne in mind, the restriction was in respect to the specified lands, and did not affect the testamentary power of the Indians to dispose of their alienable property, which power, on the contrary, has been fully recognized, first by an extension of the appropriate laws of Arkansas over the Indian Territory, and then, upon the admission of the State of Oklahoma Law. Taylor v. Parker, supra; Jefferson v. Fink, 247 U. S. 288, 294, 62 L. ed. 1117, 1123, 38 Sup. Ct. Rep. 516. *The general policy of Congress prior to the adoption of Sec. 23 plainly had been to consider the local laws of descents and wills applicable to the persons and estates of Indians, except insofar as it was otherwise provided.* Thus, by Sec. 2 of the Act of April 28, 1904, ch. 1824, 33 St. at L. 573, the laws of Arkansas, theretofore put in force in the Indian Territory, were expressly 'continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedman, or otherwise,' and jurisdiction was conferred upon the courts of the territory in the settlement of the estates of decedents, etc., whether Indian, freedman, or otherwise.

"Sec. 23 must be read in the light of this policy; and, so reading it, we agree with the ruling of the State Supreme Court that Congress intended thereby to enable *'the Indian to dispose of his estate on the same footing as any other citizen, with the limitation contained in the proviso thereto.' The effect of Sec. 23 was to remove a restriction theretofore existing upon the testamentary power of the Indians, leaving the regulatory local law free to operate as in the case of other persons and property."*

In the case of *Cully* v. *Mitchell*, 37 Fed. (2d) 493, which went up to the Tenth Circuit Court of Appeals from

the Eastern District of Oklahoma, the Circuit Court in an opinion written by Judge McDermott, in discussing the provisions of the Act of May 27, 1908, said:

> *"Our opinion, on the contrary, is that Congress removed the restrictions from 'all lands of said allottees enrolled as mixed-blood Indians having less than half Indian blood.' That is what the statute says.* By that language, Congress clearly pointed to certain rolls then in existence, and said ,in substance, 'Restrictions are removed from those persons who are listed there as less than half-bloods.' Then, in order that no uncertainty might exist, and that there might be some certain and exclusive method of ascertaining a nebulous fact, and that some stability might exist as to land titles, Congress enacted Sec. 3, by which it said, in clear language, that only the rolls of citizenship might be looked to for quantum of Indian blood; but as to age, one might look to all of the enrollment records of the Commissioner.
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> "If the language of the statute is clear, as we think it is, resort to the legislative history, or to administrative construction, is not necessary. In this case, such aids to construction fortify the conclusion reached."

The Government's position, in the case at bar, is to our minds ridiculous, in this, that it undertakes to protect, under its assumed and asserted guardianship, these so-called wards in respect to something that said alleged wards, competent, unrestricted and intelligent enterprising citizens of both the State and the Nation, freely and voluntarily divested themselves of more than a quarter of a century ago. We do not feel that it is lacking in propriety for us to observe at this point that the record does not show that these so-called Indian wards, whose alleged rights the Govern-

ment so zealously undertakes in this action to protect, are even advised of the present solicitous attitude of the Government in their behalf. If they had desired the aid and assistance of the Government they doubtless would have called upon it more than a quarter of a century ago and at a time prior to the exercise on their part of a right enjoyed by every American citizen to sign away and dispose of, upon a valuable consideration, that which belongs to him, unrestricted and uncontrolled.

(Proposition c.)

This Court is familiar with the general rule that a final judgment on the merits in an action between the same parties, or between those in privy with them, upon the same claim or demand, is conclusive whether right or wrong, not only as to every matter offered in the former action but as to every admissible matter which might have been offered to sustain the claim. See *Swift* v. *Jackson* (C. C. A. 10), 37 Fed. (2d) 237, 240, 241.

In *United States* v. *Lee*, 108 Fed. (2d) 936, the Tenth Circuit Court of Appeals, on December 21, 1939, said:

> "Next comes the question of the effect of the judgment of the District Court of Carter County rendered in the suit which Nellie Stechi instituted against Du Bois and Lee to cancel and set aside the contract. Since the homestead was free of all restrictions against alienation at the time of the execution of the contract, that court clearly had jurisdiction of the subject matter and of the parties. The authenticity of the contract, the due performance on the part of Lee, the amount due

him, his ownership of a part of the homestead, and his right to a lien on the remainder to secure the amount due him were issues tendered and adjudicated. That adjudication is binding and constitutes *res adjudicata* as to the parties to the action. But it is contended that such judgment is not binding on the United States since it was not a party. The United States is not bound by the judgment of a state court in respect of restricted property of an Indian ward where it was not a party. Zowling v. United States, 223 U. S. 528, 34 S. Ct. 659, 58 L. ed. 1080. But as has been said, the property in question was not restricted at the time the contract was executed and at the time the judgment of the state court was entered. *Nellie Stechi was unrestricted in her right to contract with respect to such property or to convey it. She exercised that right. A state court adjudicated her rights under the contract, and the decree has become final. A state court of competent jurisdiction in Oklahoma may render a valid judgment in respect to unrestricted property of an Indian of the Five Civilized Tribes. And such a judgment constitutes res adjudicata as to the Indian, and it is not open to attack in a later suit brought by the United States, except on jurisdictional grounds, even though the United States was not a party to the suit."*

In *Vinson* v. *Graham*, 44 Fed. (2d) 237, 240, 241, the Tenth Circuit Court of Appeals held in paragraphs 9-10-11-14 as follows:

"Decree of dismissal in suit brought by United States to cancel Indian's deed, held *res adjudicata* in subsequent suit brought by Indian himself seeking like relief but on different grounds.

"The former suit was brought by the government in behalf of a particular Indian and others, and the bill of complaint alleged that the lands described were allotted to the Indian as part of his surplus allotment as an adopted citizen of the Seminole Tribe, and that, under the treaty with the Seminoles and under the

laws of the United States, the Indian was not authorized to sell or alienate such lands. In the present case, the plaintiff alleged that he was a full-blooded restricted Indian, and that the deed was void because forbidden by restriction laws, and because mineral rights in the Seminole lands were severed from the surface rights under the Curtis Act, approved June 28, 1898, 30 Stat. 495, and because the mineral rights first vested in allottees on a date subsequent to time the deed was executed, so that only the surface estate, if any, passed by virtue of the deed. As respects doctrine of *res adjudicata*, separate grounds which would render the deed invalid did not constitute separate and distinct 'cause of action.'

"Valid judgment operates as estoppel as to every admissible matter which might with propriety have been offered to sustain or defeat claim.

"Judgment on merits concludes parties and their privies as to all grounds for asserting right known when suit was brought. * * *

"Decree against United States in suit prosecuted in behalf of restricted Indians bars subsequent suit by Indian on same cause of action."

In the body of the opinion that court said:

"A valid judgment on the merits, rendered by a court of competent jurisdiction in a former suit between the same parties or their privies, operates in a subsequent suit on the same cause of action, as an estoppel not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other admissible matter which might with propriety have been offered for that purpose. Cromwell v. County of Sac., 94 U. S. 351, 24 L. ed. 195; Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 47 S. Ct. 600, 71 L. ed. 1069; Reynolds v. Schmidt (C. C. A. 10), 40 Fed. (2d) 238."

It will be noted from examination of the above case that the United States of America was representing the

owners of restricted Indian lands while in the case at bar neither the Indians nor the lands were restricted. In the case of *Heckman* v. *United States*, 224 U. S. 314, 56 L. ed. 820, the Court said:

> " 'In what cases the United States will undertake to represent Indian owners of restricted lands in suits of this sort is left, under the acts of Congress, to the discretion of the Executive Department. *The allottee may be permitted to bring his own action, or, if so brought, the United States may aid him in its conduct. * * * And, as already noted, the act of May 27, 1908, makes provision for proceedings by the representatives of the Secretary of the Interior in the name of the allottee. But in the opportunities thus afforded there is no room for the vexation of repeated litigation of the same controversy.* And when the United States itself undertakes to represent the allottees of lands under restriction, and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose, relating to the same property."

The above rule is likewise applicable where the allottee conducts his own action without the aid of the United States.

In view of the above decisions, we submit that the decision of the Supreme Court of Oklahoma in *Broadwell* v. *Board of County Commissioners of Bryan County*, 88 Okla. 147, *supra*, which became final when the Supreme Court of the United States denied Broadwell's petition for writ of certiorari in 262 U. S. 740, *supra*, was *res adjudicata* as to Broadwell, his assignors in privy, Minnie Brewer and Lake Brewer, and the United States of Amer-

ica, even though the United States was not a party to the suit wherein the judgment was rendered.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of *certiorari* and thereafter reviewing the opinion of the Tenth Circuit Court of Appeals and reversing said decision.

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